# No. 22,809

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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WYATT ST. B. EUSTIS, JR.,
*Appellant,*

vs.

UNITED STATES OF AMERICA,
*Appellee.*



**Appeal from the United States District Court for the Northern District of California**

## APPELLANT'S OPENING BRIEF

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## Subject Index



## Table of Authorities Cited

## Statutes



## Rules

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### JURISDICTION

By information filed October 11, 1967, Appellant was charged with three counts of misdemeanor violation of Title 26 U.S. Code Section 7203, failure to file tax returns for the years 1962, 1963 and 1964. A jury trial was waived and trial commenced before the Honorable William T. Sweigert on February 8, 1968. Appellant was convicted on all three counts and sentence was pronounced on March 5, 1968. Appellant filed a timely notice of appeal on March 12, 1968.

The District Court assumed jurisdiction under the provisions of Title 18 U.S. Code Section 3231. This

Court has jurisdiction to review this judgment under Title 28 U.S. Code Section 1291.

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## STATEMENT OF FACTS

By information filed October 11, 1967, appellant was charged with three counts of the misdemeanor violation of Title 26 U.S. Code § 7203—failure to file tax returns for the years 1962, 1963, and 1964. (Tr. of R. 1.) It was stipulated that appellant received gross income in excess of $600.00 during the years charged, that appellant maintained accurate business records concerning income and expenses during the years charged, that appellant was first contacted by agents of the Internal Revenue Service on January 31, 1966, that on March 8, 1966, the appellant filed a delinquent federal income tax return in his own name and that of his wife for each of the calendar years 1957 through 1964 inclusive, and did so by presenting those returns to a special agent of the Internal Revenue Service; and that during the calendar years 1957 and 1958 appellant applied for and was granted extensions of time to file 1957 and 1958 returns, but that for the years 1959 through 1964 appellant made no request for extensions and no such extensions of time were granted. (Tr. of R. 5.)

Trial was commenced Thursday, February 8, 1968, a jury having been waived. (R.T. 2) From the outset it was clear that the sole issue presented to the District Court was whether there was wilful failure to file the required returns for the years in question. (R.T. 5.)

Appellant was and is a public accountant with offices at 934 Terminal Way, San Carlos, California. (R.T. 33:6.) Appellant's failure to file income tax returns for the years 1957 through 1964 was due to the pressure of business; appellant considered his clients' tax affairs as having the greater priority. (R.T. 33:13-22.) After having been granted extensions for the years 1957 and 1958 the pressure of appellant's business increased. There were no other accountants or associates in appellant's office, only some girls doing strictly bookkeeping work. They did not prepare returns. Appellant found that in order to prepare returns for years subsequent to 1957, it was necessary to go back and put the initial return together because it was impossible to file a later return before the earlier because of such factors as depreciation and amortization. (R.T. 34:3-35:3.) Throughout the period within which appellant was charged with failing to file income tax returns, appellant maintained records because he knew the returns were to be filed, had to be filed, and intended to file them. (R.T. 35:13-23.) Appellant never intended to avoid filing returns. (R.T. 36:2.) Moreover, during the year 1960, and possibly 1962 and 1963 appellant became a remainderman in two trusts which were distributed in the 1960's. This caused a change in the type of income appellant received during 1960, 1962, and 1963 and there were tax problems involved with the trusts themselves. This affected appellant's ability to prepare an income tax return because the figures originally submitted to appellant were in error and correspondence with the trustees was necessary. (R.T.

36.) There were two trusts, each distributed in a separate year (R.T. 37:11). Appellant kept accurate records of all transactions concerning these trusts (R.T. 37:24).

Appellant's attempts to make arrangements to find time to prepare these tax returns were frustrated by interruptions from clients or by internal office problems including audits from various governmental agencies. (R.T. 38:2-16.)

Appellant conferred with special agent Brennan of the Internal Revenue Service on February 2, 1966, and on March 8, 1966, appellant presented all of the returns for the years in question. These returns were prepared by the appellant personally who took time out from his office work to do this, devoting from eight to ten hours of each working day including Saturdays and Sundays—about twenty-one days. This included preparation of returns from 1957 through 1964. (R.T. 39:1-40:8.)

Appellant intended to file his federal income tax returns as soon as the figures were put together so that the returns could be filed, and this was as soon as possible. (R.T. 41:4-10.) Appellant filed State of California tax returns at the same time he filed federal returns. (R.T. 42:8-13.) In order to prepare these returns it was necessary for appellant to forego work on clients' returns. (R.T. 43:9.) Appellant was unaware that it was a criminal offense to wilfully fail to file income tax returns on time without proper extension. (R.T. 49:18-22.)

At the time appellant gave the completed income tax returns to Mr. Brennan, he also gave checks covering the taxes, including penalties and interest due to March 8, 1966. (R.T. 16:13.) The penalty through March 8, 1966, was twenty-five per cent and the interest was six per cent. (R.T. 17:15.) Thus, since approximately March 8, 1966, the government has had all of its money. (R.T. 19:15.) On receipt of these tax returns, the Internal Revenue Agents reviewed them and found no errors based on computations. (R.T. 19:21-20:3.) Appellant's records were also examined thoroughly and there was no evidence of a double set of books, of false entries, of alterations in the records, nor of false invoices or false documents. (R.T. 21:11-25.) There was no destruction of records (R.T. 22:2) and nothing from the records or the Revenue Agents' investigation of any conduct on the part of the appellant leading the agents to believe that there was any intent to mislead or conceal (R.T. 22: 4-12.) The records were excellent. (R.T. 23:8.)

The investigating agents were satisfied that appellant had made proper reports, during the years in question, concerning income tax and withholding tax for employees and employees' contributions (R.T. 25: 10), and that the apellant had an employers' account number (R.T. 25:15). All of these papers were in order and timely filed. (R.T. 25:18.) The internal revenue agents could reasonably conclude that insofar as the operation of appellant's business was concerned, and the handling of funds collected from employees to be paid to the United States Government and the

State of California, all of those returns were in proper order and filed timely and properly computed. (R.T. 26:16.)

The internal revenue agents were unable to find any bad motive or evidence of an evil intent on the part of the appellant, "other than the failure to file returns." (R.T. 29:1-18.)

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## ISSUES PRESENTED

1. Is the Mere Failure to File an Income Tax Return in the Absence of a Government Showing of Mens Rea, Bad Purpose, Intent to Avoid a Tax or Other Wrongful Purpose, Sufficient to Prove Wilful Failure to File within the Meaning of Title 26, U.S. Code § 7203?

2. Does Defendant's Right to Effective Aid of Counsel Require that Trial Counsel Be Permitted to Read the Presentence Report?

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## ARGUMENT

### A. DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL SHOULD HAVE BEEN GRANTED.

At the close of the Prosecution's case and with only the stipulation and the testimony of special agent Brennan as evidence, counsel for the defendant moved the Court for a judgment of acquittal. (R.T. 30.) The motion was submitted (R.T. 32:15), but not ruled upon. At this point the agent had testified that Mr.

Eustis told him he had not filed any tax returns for the years in question (R.T. 11:19), that he had had sufficient income during the years in question (R.T. 11:25), described the sources of his income (R.T. 12: 8) and gave as his reason for not filing the explanation that he was too busy preparing his clients' tax returns and maintaining their accounting records (R.T. 12:15).

Mr. Eustis also told the agent that although he had requested extensions to file for the years 1957 and 1958, he did not request further extensions because he would rather pay the penalties to avoid the trouble for himself and his clients. (R.T. 14:8.) All of Mr. Eustis' records were precise and accurate (R.T. 19: 28) and the agent was unable to perceive any bad motive other than not filing (R.T. 29:1). This was the state of the record at the time the Government rested and trial counsel moved the Court for judgment of acquittal. (R.T. 30.)

> "The evidence at the close of the Government's case must be sufficient to *sustain* a conviction, that is, it must be such evidence that reasonable persons *could* find guilt beyond a reasonable doubt. It is not a requirement that the evidence *compel,* but only that it is capable of or sufficient to persuade the jury to reach a verdict of guilt by the requisite standard."
>
> *Crawford v. United States* (DC Cir. 1967), 375 F.2d 332, 334.

> "Ordinarily one is not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. That awareness is all

> that is meant by the mens rea, the 'criminal intent' necessary to guilt. . . ."
>
> *United States v. Byrd* (2nd Cir. 1965), 352 F.2d 570, 572.

It is respectfully submitted that the evidence was insufficient to sustain the conviction and the motion of appellant's trial counsel should have been granted.

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## B. THE CIRCUITS ARE IN CONFLICT ON THE MEANING OF WILFULNESS AS APPLIED TO § 7203.

### 1. The Ninth Circuit.

In filing notice of appeal in the present case, counsel were not unaware of this Court's decision in *Abdul v. United States* (9th Cir. 1958), 254 F.2d 292. There, this Court determined that the meaning and degree of proof of "wilful" differed depending on whether the crime charged was a felony or a misdemeanor.

> "The meaning of the word 'wilfully' as used in the tax statutes has been considered in a number of cases and seems to have come to rest in this circuit, as well as others, as meaning with respect to felonies, 'with a bad purpose or evil motive.' (citing cases) But the meaning of the word 'wilfully' as used in the statute defining a misdemeanor has not as yet reached such repose."
>
> *Abdul v. United States* (9th Cir. 1958), 254 F.2d 292, 293.

In *Abdul* this Court approved the following instruction:

". . . the word 'wilful' as used in (the misdemeanor) counts . . . , that is, failing to make a tax return, means with a bad purpose or without grounds for believing that one's act is lawful or without reasonable cause, or capriciously or with a careless disregard whether one has the right so to act."

*Abdul v. United States* (9th Cir. 1958), 254 F.2d 292, 294.

This Court explained:

"The definition of the word 'wilfully' as used in the misdemeanor statute was correctly defined in the instructions given by the court. That a difference exists in the meaning of 'wilfully' when used in the statute defining a felony and that defining a misdemeanor is recognized. It is 'a word of many meanings, its constructions often being influenced by its context.' (*United States v. Murdock,* 290 U.S. 389, 54 Sup. Ct. 223, 78 L.ed. 381.) 'It may well mean something more as applied to non-payment of a tax than when applied to failure to make a return. Mere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of wilfulness.' (*Spies v. United States,* 1943, 317 U.S. 492, 497-498, 63 Sup. Ct. 364, 367, 87 L.ed. 418.) In the definition given, the trial court began with the statement that 'wilful' as used in the misdemeanor counts means with a bad purpose, which standing alone would meet appellant's criticism, but it is argued that the addition of the words 'or without grounds for believing that one's act is lawful or without reasonable cause, or capriciously, or with a careless disregard whether one has the right so to act,' so watered down the

> meaning of the term 'with a bad purpose' as to render the instruction erroneous. We conclude that the word 'wilful' as used in the misdemeanor statute means something less when applied to a failure to make a return than as applied to a felony nonpayment of a tax. This being true, then the words used in the instruction defining 'wilful' as relates to a misdemeanor adequately and clearly point up that difference."
>
> *Abdul v. United States* (9th Cir. 1958), 254 F. 2d 292, 294.

> "We hold that the instruction defining 'wilful' as used in the misdemeanor counts of the indictment in the instant case was not erroneous."
>
> *Abdul v. United States* (9th Cir. 1958), 254 F. 2d 292, 295.

This Court reaffirmed its view as stated in *Abdul, supra,* in *Martin v. United States* (9th Cir. 1963), 317 F.2d 753. It seems, then, that in the 9th Circuit with respect to the violation of § 7203, "wilful" means one of the following:

1. With a bad purpose, or
2. Without grounds for believing that one's act is lawful, or
3. Without reasonable cause, or
4. Capriciously, or
5. With a careless disregard whether one has the right so to act.

It should be remembered that appellant was unaware that it was a criminal offense to fail to file on

time without proper extension, wilfully. (R.T. 49:18.) The Government offered *no proof whatever* of any of the foregoing "misdemeanor" definitions of wilful. The *only* evidence in support of "wilfulness" was the failure to file itself.

**2. The Third Circuit.**

In *United States v. Vitiello* (3rd Cir. 1966), 363 F.2d 240, the court was concerned with the definition of "wilfully", in its application to § 7203. The trial court had charged the jury as follows:

> "And the word is employed to characterize such conduct as marked by a *careless disregard whether or not one has a right to so do.*
>
> "And by the term wilfully, as used in the statute, means with a bad purpose or *without grounds for believing that one's act is lawful or with such a careless disregard whether one has a right so to act.*
>
> "The word wilful means with a bad purpose or *without grounds for believing that one's act is lawful or without reasonable cause or capriciously or with a careless disregard whether one has a right so to act.*"
>
> *United States v. Vitiello* (3rd Cir. 1966), 363 F.2d 240. (Emphasis added by the Court.)

The 3rd Circuit, in reviewing the cases interpreting the word "wilful" as it relates to Title 26 § 7201 and § 7203, stated:

> "Our examination of the issue thus raised begins with the much cited opinion in *United States v. Murdock* (1933), 290 U.S. 389, 54 Sup. Ct. 223, 78

L.ed. 381, relied on by the dissent in the instant case and presumably the basis of the lower court's instruction. In *Murdock,* the defendant was convicted for failing to give required tax information in violation of an earlier statute from which section 7203 was derived. The lower court had instructed the jury to the effect that one who voluntarily refused to give the required information would be guilty of 'wilfully' failing to give the information. Thus, the issue before the Supreme Court was the proper definition of 'wilfully' as the *mens rea* requirement of this misdemeanor. In framing the issue, the court noted that wilful is a word of many meanings, for example, merely voluntary as contrasted with accidental, but that in a criminal statute it generally means 'an act done with a bad purpose * * *; without justifiable excuse * * *.' 290 U.S. at 394, 54 Sup. Ct. at 224. Then, the court continued to catalog various other meanings of wilfully, including the following:

> 'The word is also employed to characterize a thing done without ground for believing it is lawful * * * or conduct marked by careless disregard whether or not one has the right so to act * * *.' 290 U.S. at 394-395, 54 Sup. Ct. at 225.

"However, this enumeration of different meanings of wilfully in various contexts should not be read as a statement that several definitions, among them the one last quoted above, are comprehended by the criminal statute in question. Indeed, rather than adopting a number of meanings, the Court proceeded to consider the context of the misdemeanor section and concluded that wilful as an element of the offense connoted 'bad faith

or evil intent'. 290 U.S. at 398, 54 Sup. Ct. at 226."

*United States v. Vitiello* (3rd Cir. 1966), 363 F.2d 240, 242 (1966).

"Instructions which define an act as wilful when done 'without ground for believing it is lawful', or when 'marked by careless disregard whether or not one has the right so to act', have been rejected by this court as improper dilutions of the scienter required by section 7203. *United States v. Palermo* (3rd Cir. 1958), 259 F.2d 872; accord *Haner v. United States* (5th Cir. 1963), 315 F.2d 792; cf. *United States v. Litman* (3rd Cir. 1957), 246 F.2d 206.

"Our affirmative statements of the meaning of 'wilfulness' in section 7203 or its predecessor clearly exclude any type of carelessness or negligence, however inexcusable. Thus, in the *Palermo* case we said:

> "Wilfulness is an essential element of the crime prescribed by [the misdemeanor section] * * * . It requires existence of a specific wrongful intent—an evil motive—at the time the crime charged was committed * * *. Mere laxity, careless disregard of the duty imposed by law, or even gross negligence, unattended by 'evil motive' are not probative of 'wilfulness' ". 259 F.2d at 882.

"Similar language appears in *United States v. Litman, supra* at 209. The 'wilful' requirement means an act both 'intentional and reprehensible', *United States v. Goldman* (3rd Cir. 1965), 352 F.2d 263, 265 n. 3, 'attended by knowledge of the legal obligation and purpose to prevent the gov-

ernment from getting that which it lawfully requires', *United States v. Cirillo* (3rd Cir. 1957), 251 F.2d 638, 639."

*United States v. Vitiello* (3rd Cir. 1966) 363 F.2d 240, 242.

"Two cases in the Ninth Circuit, *Abdul v. United States,* 1958, 254 F.2d 292, and *Martin v. United States,* 1963, 347 F.2d 753, and the dissent in the instant case seek to justify a less restrictive definition of 'wilfulness' by arguing that the standard of wilfulness is different for the misdemeanor, defined by section 7203, than for the felony—attempt to evade tax—defined by section 7201. Justification for this claimed distinction is thought to be found in the language of the *Spies* case in which the Court distinguished the misdemeanor from the felony, saying:

> 'The difference between the two offenses, it seems to us, is found in the affirmative action implied from the term "attempt", as used in the felony subsection.' 317 U.S. at 498, 63 Sup. Ct. at 368.
>
> '* * * [For the felony] Congress intended some wilful commission in addition to the wilful omissions that make up the list of misdemeanors.' 317 U.S. at 499, 63 Sup. Ct. at 368.

"It is true that, by this language, *Spies* makes a distinction between the criminality of the misdemeanor and the criminality of the felony. *United States v. Long* (3rd Cir. 1958), 257 F.2d 340. However, this distinction is found in the additional misconduct which is essential to the violation of the felony statute, examples of which are given in *Spies* at page 499 of 317 U.S., at page

368 of 63 Sup. Ct., and not in the quality of wilfulness which characterizes the wrongdoing. Thus, in *Sansone v. United States,* 1965, 380 U.S. 343, 85 S. Ct. 1004, 13 L.ed. 2d 882, the defendant, indicted and tried for the section 7201 felony, claimed that he was entitled to a charge on the misdemeanor under the lesser included offense doctrine. After finding that the only issue at trial was whether the defendant's acts charged as constituting attempted tax evasion were 'wilful', the Court held that the defendant was not entitled to a lesser offense charge because, as applied to the given fact situation, 'Wilful' in the two sections '"covered" precisely the same ground'. 380 U.S. at 352, 85 Sup. Ct. at 1010.

"Actually, one of the conclusions of the Court in *Spies* was that to be convicted of failure to pay a tax, the misdemeanor, the failure must be characterized by 'some element of evil motive' because to convict in absence of such scienter would violate 'our traditional aversion to imprisonment for debt'. 317 U.S. at 498, 63 Sup. Ct. at 367.

"It follows that it was error in this case to instruct the jury that it might find 'wilfulness' within the meaning of section 7203 in conduct characterized by merely careless disregard of legal obligation or in acts that were merely capricious or not justified by any reasonable belief in their legality."

*United States v. Vitiello* (3rd Cir. 1966), 363 F. 2d 240, 243.

**C. The Reasoning of the Third Circuit Should Be Applied to the Facts of This Case.**

In order to apply the reasoning of the Third Circuit to the facts of this case, it is not necessary for this Court to wholly reject *Abdul* and similar cases. *Abdul* involved a jury trial where the instructions found proper *included* the phrase "Wilful . . . means with a *bad purpose*. . . ." No case has been found in the Ninth Circuit where this Court has held that a *mere failure to file a return,* without more has been held to be a sufficient showing of wilfulness to justify a conviction.

It appears that in arriving at its conclusions, the Court in *Abdul* stressed the dictum of *United States v. Murdock,* 290 U.S. 389, 54 Sup. Ct. 223, 78 L.ed. 381, and *Spies v. United States,* 317 U.S. 492, 497-498, 63 Sup. Ct. 364, 367, 87 L.ed. 418, to the effect that the word "wilful" is a word of many meanings, and may well mean something more as applied to *nonpayment* of the tax than where applied to failure to *make a return.* A careful analysis of *Murdock* and *Spies* appears not to compel the conclusion that proof of the misdemeanor crime of failure to file a tax return may be proved by evidence less than that amounting to a mens rea.

In *Murdock* the defendant was charged with refusal to give testimony and supply information relating to deductions claimed in his tax returns for monies paid to others in violation of § 1114(a) of the Revenue Act of 1926 and § 146(a) of the Revenue Act of 1928, which sections were identical. Inter alia, these sections provide:

> "any person . . . who wilfully fails to . . . make such return . . . or supply such information. . ."

A careful examination of *Murdock* discloses that the Court there made no suggestion, by either holding or dictum, that "wilfully" insofar as it relates to failure to make a return, may be proved by anything less than a showing of mens rea, or a bad motive.

In *Murdock,* the defendant was charged with a wilful failure to give information and the thrust of the opinion deals with the defendant's failure to disclose the identity of the person to whom he claimed he made deductible payments. But because of the failure of the Court to otherwise caution, it would seem that the following language should be equally applicable to that portion of the section dealing with a wilful failure to make a return. The Court in *Murdock* made these comments:

> "The Revenue Acts command the citizen, where required by law or regulations, to pay the tax, to make a return, to keep records, and to supply information for computation, assessment, or collection of the tax. He whose conduct is defined as criminal is one who 'wilfully' fails to pay the tax, to make a return, to keep the required records, or to supply the needed information. Congress did not intend that a person, by reason of a bonafide misunderstanding as to his liability for the tax, as to his duty to make the return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission of

> these instances must be wilful, to be criminal, is persuasive that the same element is essential to the offense of failing to supply information."
>
> *United States v. Murdock* (1933), 290 U.S. 389, 395, 54 Sup. Ct. 223, 226, 78 L.ed. 381, 385.

> "Here we are concerned with a statute which denounces a wilful failure to do various things thought to be requisite to a proper administration of the income tax law, and the government in the trial below, we think correctly, assumed that it carried the burden of showing more than a mere voluntary failure to supply information, with intent in good faith, to exercise a privilege granted the witness by the Constitution. The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense."
>
> *United States v. Murdock* (1933), 290 U.S. 389, 396, 54 Sup. Ct. 223, 226, 78 L.ed. 381, 386.

Counsel realizes that the foregoing language was used by the Court in *Murdock* primarily with reference to that violation dealing with the defendant's failure to incriminate himself by disclosing the identity of the person to whom he had made the deductible payments; however, by failure to distinguish the section involving a wilful failure to make a return, the Court seems to make the foregoing language applicable to a wilful failure to make a return as well. In any event, *Murdock* discloses no sound basis

for an inference that the Supreme Court intended that a wilful failure to make a return requires *less* than an evil intent or bad faith. Thus, to the extent that this Court's decision in *Abdul* rests on *Murdock, supra,* its foundation is weakened.

In *Spies v. United States* (1943), 317 U.S. 492, 63 Sup. Ct. 364, 87 L.ed. 418, the defendant was charged with making a wilful *attempt* to evade or defeat a tax. Although the Court in *Spies* does use language by way of dictum suggestive of a distinction in the quantum of proof necessary to convict for the felony (attempt to evade or defeat a tax) and the misdemeanor (wilful failure to pay a tax or make a return) a close analysis of *Spies* indicates clearly that that Court was concerned with the methods by which *a wilful attempt to defeat and evade* might be proved. (Citing by way of illustration that a wilful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets, of covering up sources of income, etc.) The Court in *Spies* does not suggest that a wilful failure to file may be proved by a mere failure to file, or in the absence of mens rea or bad purpose. The Court merely points out:

> "Wilful but passive neglect of the statutory duty *may* constitute the lesser offense. . . ."
>
> *Spies v. United States* (1943), 317 U.S. 492, 499, 63 Sup. Ct. 364, 468, 87 L.ed. 418, 423 (emphasis added).

> "Mere voluntary and *purposeful,* as distinguished from accidental omission to make a timely return *might* meet the test of wilfulness."
>
> *Spies v. United States* (1943), 317 U.S. 492, 498, 63 Sup. Ct. 364, 367, 87 L.ed. 418, 422 (emphasis added).

It is submitted that the distinction between wilfulness as used in the felony section and wilfulness as used in the misdemeanor section lies, as stated *supra,* page 15 herein in *United States v. Vitiello* (3rd Cir. 1966) 363 F.2d 240, in the *additional misconduct* which is essential to the violation of the felony statute, *and not in the quality of wilfulness which characterizes wrongdoing.* For his failure to file and pay the tax when due, appellant herein has paid to the Government all penalties and interests demanded. (R.T. 16:13.) It seems one thing for the Government to exact penalties and interest for a "mere failure to measure up to the prescribed standard of conduct" (*United States v. Murdock, supra*), or for failure "to observe statutory duties to make timely returns" (*Spies v. United States, supra*), and quite another to make the citizen who has maintained precise and accurate records a criminal by reason of a mere failure to file, without any showing whatever of a criminal intent, or mens rea that is normally found in any crime for which a person is to be subjected to punishment. The Revenue Agents here were unable to find any bad motive or evidence of evil intent on the part of the appellant other than the failure to file a return. (R.T. 29:1-18.) Even during the period that

the appellant failed to file, he was nevertheless making proper reports concerning income tax and withholding tax for employees and employees' contributions (R.T. 25:10), and had an employer's account number (R.T. 25:15). These factors alone indicate an absence of a plan to avoid filing at all; and this is the true reason for the criminal punishment. It is unjust to fix criminal sanctions and a criminal record on a responsible citizen whose failure arose simply from a series of circumstances that made it impossible for him to both file the tax when due and continue to handle clients' affairs.

Finally, unless the word "wilfully" was intended by Congress to mean something more than a mere failure to file, there is little reason for its inclusion in § 7203, for the same purpose would be served by its deletion.

**D. Refusal to Permit Trial Counsel to Inspect the Probation Report Is a Denial of Effective Aid of Counsel.**

In *Verdugo v. United States of Ameriea* (9th Cir. decided May 16, 1968) No. 20803; amended opinion filed October 7, 1968, it was determined that consideration by the Court of a probation report containing information that had been excluded at trial and was prejudicial was reversible error. In *Verdugo,* this Court noted that counsel's argument to the effect that the accused's right to "make a statement in his own behalf and to present any information in mitigation of punishment" (Rule 32(a), Fed. R. Crim. P.) was of little value without knowledge of the allegations in the presentence report had force and that the authorities provided no ready answer.

It is appellant's contention here that the rule of *Verdugo* should be applied and that reversal is required to permit appellant's counsel to inspect the presentence report.

In advancing this point, appellant does not suggest that harmful material *was* presented to the trial Court; only that the right of trial counsel to inspect the presentence report in every instance should be made clear, as a requirement of effective aid of counsel.

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## CONCLUSION

It is not necessary in order to reverse this conviction, for this Court to wholly adopt the reasoning of the Third Circuit, nor to establish a rigid definition of wilfulness as applied to Section 7203. It is enough to perceive that under the facts of this case, where no more was shown by the Government than a *mere failure to file a return,* an adequate showing of wilfulness has not been made.

If a distinction between the felony and misdemeanor section meanings of wilfulness is to be made, that distinction should go to the *additional misconduct* which is essential to the violation of the felony statute, and not to the *quality of wilfulness which characterizes wrongdoing.*

Unless the word wilfulness comports some bad purpose, there is no logical reason for its placement in

Section 7203, and the crime should be complete merely on failure to file.

The judgment should be reversed.

Dated, San Francisco, California,
October 29, 1968.

Respectfully submitted,
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LIN B. DENSMORE,
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*Attorneys for Appellant.*